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No. 88-792

In the Supreme Court of the United States

OCTOBER TERM, 1988

GLEN F. MILLER, PETITIONER

v.

BOBBY L. PERSON AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's contempt conviction should be reversed on the ground that the district court took judicial notice of the injunction that petitioner was charged with having violated and failed to instruct the jury that it need not take the existence of the order as proved.

2. Whether the court of appeals erred in holding that the case had properly been prosecuted by the United States Attorney with the assistance of the attorney for the civil plaintiffs who had initiated the contempt proceedings.

3. Whether petitioner was entitled to have all blacks excused from the jury "for cause" because the criminal contempt charges against petitioner alleged that he had violated a decree that enjoined interference with the exercise of rights by all blacks in the State.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 4a-22a) is reported at 854 F.2d 656.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1988 (Pet. App. 4a). The court of appeals denied a petition for rehearing on September 13, 1988 (Pet. App. 23a). The petition for a writ of certiorari was filed on November 9, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on two counts of committing criminal contempt, in

violation of 18 U.S.C. 401(3), by disobeying a consent decree that prohibited him from operating a paramilitary organization and from committing other acts contrary to the laws of North Carolina. Pet. App. 2a, 8a. Petitioner was sentenced to three years' probation on the first count and six months' probation on the second count. *Ibid.* The court of appeals affirmed. *Id.* at 22a.

1. In June 1984, respondent Bobby Person filed a civil rights action, naming as defendants the Carolina Knights of the Ku Klux Klan, petitioner (who was the leader of the Klan), and other individuals associated with the Klan. Pet. App. 5a. The complaint alleged that the defendants had committed violent and intimidating acts against blacks in North Carolina "with the intent of depriving them * * * of the equal protection of the laws, and of otherwise violating their rights under federal and state law." C.A. App. 2. Pursuant to Fed. R. Civ. P. 23(b)(2), the district court ultimately certified a plaintiff class consisting of "all black citizens in the State of North Carolina who seek to exercise their state and federal rights free from interference by the defendants." Pet. App. 5a.

In January 1985, the parties entered into an agreement, which the parties authorized the court to enter as a consent decree, prohibiting the defendants from "operat[ing] a paramilitary organization" and from committing certain other related acts prohibited by North Carolina law.[1] Pet. App. 5a-6a. Petitioner signed the agreement. C.A. App. 33-34. On January 18, 1985, the district court held a

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[1] To simplify, the three provisions of North Carolina law identified in the agreement, N.C. Gen. Stat. §§ 14-10, 14-288.20(b)(1), 14-288.20(b)(2) (1987), concern assembling to practice military exercises, teaching the use of violence for use in furtherance of a civil disorder, and assembling for training in the use of violence for furthering a civil disorder.

hearing, which petitioner attended; the same day the court entered an order that embodied the agreement in a consent decree (Pet. App. 6a) and directed Person to give notice to the absent members of the plaintiff class (C.A. App. 39-40). After constructive notice was effected (*id.* at 42-69), the court substituted the Klan's successor organization, the White Patriot Party (WPP), for the Klan and made its decree final on September 17, 1985 (*id.* at 70-72).

2. On April 22, 1986, Person's counsel, Morris Dees, filed a motion asking the district court to hold petitioner and the WPP in criminal contempt. The supporting complaint, as later amended, alleged that petitioner and the WPP were continuing to operate a paramilitary organization and were violating two of the North Carolina statutes referred to in the decree. Pet. App. 6a; C.A. App. 115, 177, 228, 261. In response, the court ordered petitioner to show cause why he should not be held in contempt. Pet. App. 7a.

For approximately two months, Dees acted as the prosecutor of the contempt proceeding without objection by petitioner. On June 12, 1986, however, petitioner moved to disqualify Dees on the ground that Dees was likely to be a material witness. Pet. App. 7a. The district court stated that Dees was not likely to be a witness (C.A. App. 193), but in order to avoid even the appearance of impropriety, the court ordered "that the criminal prosecution of this action shall be under the direct supervision and control of the United States Attorney for this district. Plaintiffs' counsel may assist the United States Attorney prior to and during the course of the trial * * *." *Ibid.*

At the beginning of jury selection, the court described the case to the venire so that the prospective jurors could answer questions about their connection with the case and their ability to render an unbiased judgment. The court specifically recounted the existence and contents of the

consent decree. C.A. App. 522-523.[2] Subsequently, petitioner challenged all of the black persons on the venire for cause, contending that they were members of the class benefited by the order that petitioner was charged with having violated. *Id.* at 573, 585, 617. The court denied the challenges for cause. Petitioner used his peremptory challenges, however, to rid the jury of all but one black person.

At the close of the government's case, petitioner moved for a judgment of acquittal. Petitioner alleged as one ground that no evidence had been presented showing the existence of the court order that formed the basis of the prosecution. C.A. App. 1107-1108. The court rejected that ground, stating (*id.* at 1108): "I think the court order is a part of the proceeding itself. I don't deem it necessary to introduce evidence of that." Petitioner was found to have operated a paramilitary organization and to have violated two provisions of North Carolina law as charged. Pet. App. 8a.

3. The court of appeals affirmed. Pet. App. 1a-22a. Petitioner argued that the consent decree had never been placed in evidence and that, even if the district court's statement (quoted above) is construed as taking judicial notice of the order, that notice was improper because no one had requested it. *Id.* at 9a. The court of appeals concluded, to the contrary, that the district court had in fact taken judicial notice of its order, "by this means * * * lay[ing] it before the jury for consideration" (*ibid.*), and that Fed. R. Evid. 201 permitted the court to take judicial notice of the order sua sponte (Pet. App. 9a).[3]

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[2] Contrary to petitioner's suggestion (Pet. 22-23), the court did not tell the venire about the existence of a beneficiary class or about the class-action nature of the original suit. See C.A. App. 585.

[3] In his reply brief in the court of appeals, petitioner argued that the government failed to prove that he had actual notice of the decree.

The court of appeals also rejected petitioner's contention that Dees's role in prosecuting the contempt was excessive under this Court's decision in *Young* v. *United States ex rel. Vuitton Et Fils S.A.*, No. 85-1329 (May 26, 1987).[4] Rather than conducting a quantitative comparison of the trial activities of the government prosecutor and Dees, as petitioner suggested, the court held (Pet. App. 14a-15a) that, under *Young*, the proper inquiry was whether the disinterested, government prosecutor had control over critical prosecutorial decisions.[5] The court determined that petitioner had not shown that he had been prejudiced by Dees's activities during the short period before the United States Attorney took over the prosecution. *Id.* at 16a. The court also concluded that there was no indication that the United States Attorney, once he came into the case, ever relinquished control over any critical prosecutorial decisions. *Ibid.*

Finally, the court of appeals rejected petitioner's argument that the district court erred in not excluding all blacks

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The court of appeals did not comment on that contention. Petitioner has never denied either the existence of the order or his notice of it.

[4] In *Young*, which was decided after the verdict in this case, this Court held that counsel for a party who is the beneficiary of a court order may not be placed in charge of prosecuting a contempt action that alleges a violation of that order. The Court explained that permitting such an interested party to prosecute a contempt creates "*opportunities* for conflicts to arise" and presents "at least the *appearance* of impropriety." Slip op. 18. This Court added, however, that private counsel's unique familiarity with the case could be put to use in assisting the disinterested prosecutor. *Id.* at 18 n.17.

[5] Such decisions, the court of appeals said (Pet. App. 15a), included decisions about what targets to pursue, what methods of investigation to use, what information to seek or use, what offenses and what persons to charge, whether to enter into a plea bargain, and whether immunity should be granted. See also *Young*, slip op. 17.

from the jury for cause. Pet. App. 17a. The court of appeals reasoned that challenges for cause are generally limited to instances of actual bias and that this case did not involve one of the "extreme situations" where it is appropriate to invoke the doctrine of implied bias. *Ibid.* The court explained that the criminal contempt proceeding was "not simply the continuation of the private parties' civil litigation," but was "a proceeding between the public and the defendant" brought to vindicate the court's authority. *Ibid.* The plaintiff class that is the beneficiary of the consent decree, the court added, had no "pecuniary or other unique benefit to be gained" from this criminal proceeding, and the decree would remain in force regardless of the outcome of this prosecution. *Id.* at 17a-18a.[6]

ARGUMENT

1. Petitioner challenges on two grounds the court of appeals' conclusion that the existence of the consent decree was properly established. He first argues (Pet. 10-12) that the district court did not take judicial notice of the order in a legally adequate manner. That claim, however, was neither raised nor considered below. In the court of appeals, petitioner did not challenge the formal adequacy of the district court's taking judicial notice of the consent decree. Rather, conceding that the district court "apparently took judicial notice of its order" (Br. 14), petitioner argued that the order could not be judicially noticed but had to be proved, and he suggested that the court's act of taking judicial notice was ineffective because the government had never requested that notice be taken. In

[6] In addition to the three challenges described above, the court of appeals rejected petitioner's several other contentions as well. Pet. App. 9a-13a, 18a-22a.

any event, petitioner's claim of inadequate judicial notice is incorrect on the merits: the district court clearly identified the subject of the judicial notice, the consent decree; indeed, it informed the venire of the decree's existence and contents during voir dire (C.A. App. 522-523) and gave the jury a copy of the order to take to the jury room for deliberations (C.A. App. 1416-1418).[7]

Petitioner also contends (Pet. 12-13) that, if the order was properly noticed, the district court violated Fed. R. Evid. 201(g) by failing to instruct the jury that it may but need not take the existence of the order as proved. Petitioner raised that point only in a footnote in his reply brief in the court appeals (at 3 n.1), and the court of appeals did not address the issue.[8] In any event, the district court's failure to give the Rule 201(g) instruction would not justify reversal of petitioner's convictions. Petitioner neither asked the district court to give such an instruction nor made a contemporaneous objection to the charge given. See Fed. R. Crim. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to con-

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[7] Petitioner adds to his claim regarding the adequacy of the judicial notice a suggestion (Pet. 10 n.8) that there was insufficient evidence that petitioner had knowledge of the decree. That claim is not within any of the questions presented (Pet. i); in particular, it is not within the judicial notice question. Moreover, petitioner did not make the argument until his reply brief in the court of appeals (at 3-4), and the court of appeals did not separately address it. The court of appeals did conclude that there was sufficient evidence to support the jury's finding that petitioner intentionally violated the decree (Pet. App. 12a-13a), which implies that he had knowledge of the decree. We note, too, that petitioner signed the agreement that was entered as a consent decree. C.A. App. 34.

[8] Because the court of appeals in this case did not rule on any jury instruction question, petitioner's suggestion of an intercircuit conflict on the issue (Pet. 9) is incorrect.

sider its verdict * * *."). And the failure to give a Rule 201(g) instruction did not constitute plain error within the meaning of Fed. R. Crim. P. 52(b), for there was no miscarriage of justice here. Petitioner has never disputed that the consent decree existed (and was the document given to the jury); and the jury could not possibly have found that the decree did not exist after the court interpreted the decree, explained to the jury what it must find in order to conclude that the decree had been violated, and permitted the jury to take the decree to the jury room. See, *e.g.*, *United States* v. *Frady*, 456 U.S. 152 (1982).[9]

2. Petitioner next contends (Pet. 14-21) that the court of appeals' ruling is contrary to this Court's decision in *Young* v. *United States ex rel. Vuitton Et Fils S.A.*, *supra*. That contention is meritless. The court of appeals in no way departed from *Young*'s holding that an attorney for a beneficiary of a court order should not be appointed as the sole or principal prosecutor in a contempt prosecution for violating the order. Rather, the court correctly determined

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[9] The decision of the court of appeals does not conflict with *United States* v. *Mentz*, 840 F.2d 315 (6th Cir. 1988). First, as we have explained, the court of appeals in the present case did not address either of the two issues on which petitioner cites *Mentz*—the formal adequacy of judicial notice and the validity of a court's instruction on an essential element of an offense. In any event, on the first question, *Mentz* did not in fact rule on the formal adequacy of a district court's attempt to take judicial notice, but found that there had not been any such attempt (*id.* at 322); moreover, the district court in the present case identified "the fact noticed and articulate[d] its justification" (Pet. 11), as *Mentz* notes a trial court should do. On the Rule 201(g) question, *Mentz* involved a question of harmless error, because the defendant objected to the jury instruction in a timely manner; the present case involves a question of plain error, because petitioner did not make a timely objection to the court's failure to give the instruction in question.

(Pet. App. 13a-17a) that respondent Person's lawyer, Dees, did no more than assist the disinterested government attorney in the prosecution, a practice that *Young* approved. Slip op. 18 n.17.

The court of appeals correctly declined to evaluate Dees's role in the present prosecution by a quantitative assessment of how much of the trial work Dees performed: under *Young*, the proper inquiry was whether Dees was subject to the government attorney's control with regard to all critical decisions. See *Young*, slip op. 18 n.17 (private counsel's "familiarity [with the charged conduct] may be put to use in *assisting* a disinterested prosecutor in pursuing the contempt action, but cannot justify permitting counsel for the private party to be in control of the prosecution"). With respect to the period before the United States Attorney entered the case, the court of appeals determined (Pet. App. 16a) that Dees made no final and irrevocable decisions on matters requiring prosecutorial discretion; the court noted that petitioner did "not actually point to any specific prejudice attributable to the interval of Dees' sole control" (*ibid.*). When the United States Attorney entered the proceedings, he filed a new contempt complaint to reinitiate the prosecution (*id.* at 7a), and he entered under an order of the district court that he exercise "direct supervision and control" over the prosecution (*id.* at 7a, 16a). There was no reason, the court of appeals concluded (*id.* at 16a), to doubt that the United States Attorney actually maintained the control that the district court order required. In addition to noting the "presumption of regularity" (*ibid.*), the court of appeals pointed out that all of the formal indicia of control suggested as much, and the record contained no evidence suggesting the contrary.[10]

[10] Petitioner's descriptions of the tasks performed by Dees (Pet. 16, 18) in no way undermine the court of appeals' conclusion that Dees was not in control.

The court of appeals' determination that government counsel retained control over the prosecution—so that petitioner was not subject to a prosecution directed by an interested person—correctly applies the *Young* decision to the record in this case. That factbound determination raises no general issues concerning the proper interpretation of *Young*; nor, contrary to petitioner's allegation (Pet. 19), does it create any conflict among the circuits.[11] In addition, the peculiar circumstances presented here, involving the initiation of a contempt prosecution by private counsel, are not likely to recur. The contempt prosecution in this case took place prior to this Court's decision in *Young*. As the court of appeals stated (Pet. App. 16a-17a), in the future district courts will no doubt "follow the rule * * * derived from *Young* and make initial reference to the United States Attorney's Office before authorizing any participation * * * by private counsel."

3. Petitioner contends finally (Pet. 21-24) that, under the Fifth Amendment Due Process Clause, he was entitled to have the court strike all of the black potential jurors for cause. His theory is that bias should have been imputed to all of those jurors as a matter of law, even if there was no evidence of actual bias on their part, because all were "class beneficiaries" of the consent decree whose violation was at issue in the contempt proceeding. The court of ap-

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[11] Petitioner points to the Sixth Circuit's decision in *Polo Fashions, Inc.* v. *Stock Buyers Int'l, Inc.*, 760 F.2d 698 705 (1985), cert. denied, 482 U.S. 905 (1987). The Sixth Circuit there held that counsel for an interested party may not act as "sole or primary counsel." Although the Sixth Circuit did not define "primary counsel," it presumably meant the term to refer to the attorney who controls the prosecution, not the attorney who examines the largest number of witness. In any event, *Polo Fashions* was decided prior to this Court's decision in *Young*.

peals' rejection of that contention is correct and does not warrant this Court's review. Pet. App. 17a-18a.

Petitioner cites no decision finding implied bias in circumstances like those presented in this case. Nor is there any reason to believe that the peculiar circumstances here present any recurring problem that should be addressed by this Court. In any event, this is not one of those "extreme situations" (*Smith* v. *Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring)) in which the law might justifiably impute bias even where no actual bias could be found.

Any personal interest the black venirepersons might have had in the contempt prosecution was highly attenuated. Although they were members of the plaintiff class in the underlying civil suit, "contempt proceedings arising out of civil litigation 'are between the public and the defendant, and are not part of the original cause.' " *Young*, slip op. 16 (quoting *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 445 (1911)). Indeed, it is because the contempt proceeding is designed to vindicate the court's authority, and not to serve the interests of any private parties, that *Young* requires a disinterested prosecutor. Moreover, even if in some contempt cases individual beneficiaries of the underlying court order have a sufficient personal interest to impute bias to them, it would not be appropriate to impute such bias to all members of a large, diffuse class like the class involved in the present case, including all those persons who have never been personally subject to unlawful conduct at the hands of petitioner or his organizations.[12] That is especially so where, as here, a finding of implied bias, by drawing

[12] Petitioner suggests (Pet. 23 n.12) that class members had a pecuniary interest in the contempt proceeding because they might pursue damages claims by reopening the underlying civil suit if the consent decree were breached. But even aside from the speculative nature

an express racial line, would exclude all black citizens in the State. This Court has recognized in other contexts that "[e]xclusions of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson* v. *Kentucky*, 476 U.S. 79, 85 (1986).

In these circumstances, there is no justification for departing from the ordinary practice of requiring proof of actual bias where a litigant alleges bias as a ground for striking a potential juror. *Smith* v. *Phillips*, 455 U.S. at 215; see also *United States* v. *Loucas*, 629 F.2d 989, 992 (4th Cir.), cert. denied, 450 U.S. 1030 (1980).[13] The op-

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of the suggestion that the contempt proceeding might lead to a reopening of the original suit (see also *In re Virginia Elec. & Power Co.*, 539 F.2d 357, 367 (4th Cir. 1976) ("bare expectancy" of damages is not sufficient to require disqualification of judge who is class member in the suit)), petitioner overlooks the fact that the civil complaint in the present case did not seek damages from petitioner at all and did not seek damages on behalf of the class from any defendant. C.A. App. 17.

[13] Contrary to petitioner's suggestion (Pet. 21-22), *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1308-1310 (9th Cir. 1982), aff'd mem., 459 U.S. 1191 (1983), did not involve a judicial disqualification based on mere party status under 28 U.S.C. 455(b)(5); rather, it involved disqualification under 28 U.S.C. 455(b)(4) based on the financial interest of the judge's wife. The class of all black citizens in North Carolina has no such financial interest in this case.

Indeed, where questions similar to the question presented here have arisen with respect to judges in civil suits who are technically members of a beneficiary class, the courts have reached conclusions similar to that reached by the court of appeals in this case. See, *e.g.*, *United States* v. *Alabama*, 828 F.2d 1532, 1541-1542 (11th Cir. 1987), cert. denied, No. 87-1200 (June 20, 1988) (that a black judge's children were members of the plaintiff class of all blacks who might want to go to a state university in the Montgomery area does not require disqualification because the "interest" is in a public matter and is broadly shared by all young black Alabamians); *In re City of Houston*, 745 F.2d 925 (5th Cir. 1984) (black judge need not disqualify herself from

portunity to ask questions to disclose bias on the part of potential jurors is adequate to the task of ensuring that defendants like petitioner are tried by an impartial jury. Petitioner was not denied such an opportunity, and there is no reason to doubt that he was convicted by an impartial jury in accordance with the requirements of due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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voting rights case, where class consisted of all black and Hispanic voters); *Christiansen* v. *National Savings & Trust Co.*, 683 F.2d 520 (D.C. Cir. 1982) (judges who are federal Blue Cross-Blue Shield participants not disqualified from case brought by such participants where no monetary relief is sought); *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980) (self-disqualification by judge as natural gas consumer reversed); *Plechner* v. *Widener College, Inc.*, 569 F.2d 1250 (3d Cir. 1977) (judge need not disqualify himself because of membership in the American Bar Association, a party).

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